Supreme Court, U.S.
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92-682

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BIDYUT K. NIYOGI,

PETITIONER

vs.

EQUIBANK,

a Pennsylvania Corporation,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Bidyut K. Niyogi

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QUESTION PRESENTED

Is Respondent liable for fraud or negligent misrepresentation when Petitioner is not only induced into a loan transaction in which Respondent has a substantial financial interest which enables Respondent to fully recover a third party non-performing loan, that Respondent's management had labelled as a "deadbeat loan," but also liable for concealing material information in a lender-borrower situation causing Petitioner considerable financial losses? Moreover, is Respondent also liable for fraud or negligent misrepresentation for concealing prior lower loan interest rates, and adding on an insurance fee, and not refunding the balance of the insurance fee on the termination of the loan transaction? Additionally, is Respondent similarly liable for copying

Petitioner's signature for release and sale of collateral without Petitioner's authorization?

Under the racketeering Influenced and Corrupt Organizations Act ("RICO"), is Respondent liable if Respondent participated in at least two or more objective fraudulent acts and also can Respondent be held liable under "RICO" and charged both as a person and an enterprise when engaged in racketeering activities and was a direct or indirect beneficiary?

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OTHERS

None.

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1992

BIDYUT K. NIYOGI,

PETITIONER

vs.

EQUIBANK,

a Pennsylvania Corporation,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Petitioner, Bidyut K. Niyogi, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the

Third Circuit refusing to review a question of negligent misrepresentation or fraud of Respondent in a loan transaction wherein Respondent had substantial financial interests, etc., and also if Respondent is liable under the Racketeering Influenced and Corrupt Organizations Act ("RICO") laws.

OPINIONS BELOW

The judgement order of the Court of Appeals appears in Appendix A to this Petition. The unpublished written opinion of the District Court for the Western District of Pennsylvania appears in Appendix B to this Petition. The unpublished recommended ruling of the Magistrate, adopted by the District Court for the Western District of Pennsylvania, appears in Appendix C.

JURISDICTION

The Court of Appeals' judgment order in this matter was filed on April 22, 1992, set forth in Appendix A. A timely Petition for Rehearing was filed on May 6, 1992. The Court of Appeals' denial of the Petition for Rehearing was issued on May 15, 1992, and is set forth in Appendix D. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §§ 1961-1968. The portions of RICO that are relevant are § 1962 Prohibited activities (a) within the meaning of Section 2, Title 18 United States Code and § 1964 - Civil remedies (c).

STATEMENT OF THE CASE

The United States District Court, Western District of Pennsylvania, had original jurisdiction.

On August 22, 1991, an unpublished summary ruling of the Magistrate was adopted on September 20, 1991, by the District Court of Western Pennsylvania and also adopted by the Court of Appeals for the Third Circuit on April 22, 1992. A Petition for Rehearing was timely filed on May 6, 1992, which Petition for Rehearing was denied on May 15, 1992.

The Magistrate's recommendations which were adopted by the District Court and the Court of Appeal in the Third Circuit are in total conflict with decisions of other United States Court of Appeals on similar issues. The conflicts will be discussed separately with respect to

fraud or a negligent misrepresentation and pursuant to "RICO."

On the question of negligent misrepresentation or fraud, the Magistrate recommendations are not only in total conflict with decisions in other U.S. Court of Appeals, but he also failed to appreciate the basic difference between a simple lender-borrower relationship with one in which the Respondent as lender had substantial financial interests, in the lender-borrower relationship. Here, the Respondent as lender received the substantial amount of $11,347.17 from a total loan of only $17,972.62. This is all the more compounded by the fact, which the Magistrate failed to appreciate, that Respondent as lender immediately recovered a non-performing loan of $11,347.17, which was regarded by Respon-

dent's own management as a "deadbeat" loan. In the Fifth Circuit, it was established in C.A. 5 (Tex.) 1991 in *Richter, S.A. v. Bank of America Nat. Trust and Savings Assoc.*, 939 F.2d 1176, as follows:

> **C.A. 5 (Tex.) 1991.** Under Texas law, negligent misrepresentation is shown if there is supply of false information for the guidance of others in their business transactions by one who has pecuniary interest in course of business, is subject to liability for pecuniary loss caused to others by justifiable reliance on information, and fails to exercise reasonable care or competence in obtaining or communicating information,

> whether or not misrepresentation was made by accident or by intent. *Richter, S.A. v. Bank of America Nat. Trust and Sav. Ass'n.*, 939 F.2d 1176.

Moreover, Respondent during the loan transaction assured Petitioner of the good value of the loan. However, it is established in the Court of Appeals (N.J.) 1992 in *Shapiro v. UJB Financial Corp.*, 964 F.2d 272, as follows:

> **C.A. 3 (N.J.) 1992.** New Jersey law extends cause of action for negligent misrepresentation to foreseeable individual investors who, as a result of their reliance on negligently made misrepresentations, suffer economic loss. - *Shapiro v. UJB Financial Corp.*, 964 F.2d 272.

Furthermore, Respondent maintained Total Silence, and concealed several important details about the loan transactions, by not only raising the interest rate of the loan, but also unknown to the Petitioner added an insurance fee. Respondent compounded the injury by not even refunding the balance of the insurance fee when the loan transaction was prematurely terminated. Moreover, when the loan transaction was prematurely terminated, Respondent copied the signature of the Petition to authorize the sale of the collateral (298 Westinghouse Electric Corporation shares). Since when is the forging of someone's signature not fraud in law? These multiple acts of added fraud were not even considered by the Magistrate nor by the District Court, or in the Court of Appeals' confirmations.

It has also been held in C.A.D.C. 1987 that:

> Fraud consisting of misstatements or omissions that were not in accord with facts regarding essential terms of loan arrangement produced single injury, that is, foreclosure of debtors' home, and, therefore, justified award of joint and several liability under District of Columbia law against mortgage corporation, president, loan brokers, settlement attorney, and note buyer. D.C. Code 1981, §§ 28-3901 to 28-3908. *Faison v. Nationwide Mortg. Corp.*, 839 F.2d 680.

In the Seventh Circuit, it was held in:

> **C.A. 7 (Ill.) 1989.** Omissions can be actionable as fraud. *Federal Deposit Ins. Corp. v. W.R. Grace & Co.*, 877 F.2d 614.
>
> **C.A. 7 (Ill.) 1989.** When seller has, without substantial investment on its part, come upon material information that buyer would find either impossible or very costly to discover himself, seller must disclose it. *Federal Deposit Ins. Corp. v. W.R. Grace & Co.*, 877 F.2d 614.

It is judicially accepted that, besides omission, Respondent has a duty to disclose material facts which Petitioner would find impossible or very costly to

discover. These conflicting decisions were not taken into consideration by the Magistrate, and as such, Petitioner was denied justice and fair treatment.

The Third Circuit in C.A. 3 (Pa.) 1989 also decided as follows:

> **C.A. 3 (Pa.) 1989.** Mortgage transactions constitute "trade or commerce" within scope of Pennsylvania unfair trade practices and consumer protection law. 73 P.S. § 201-3. -- *In re Smith,* 866 F.2d 576.
>
> Scope of Pennsylvania unfair trade practices and consumer protection law provision creating private right of action to recover damages for unfair or deceptive acts or practices is not limited to initial mortgage

> agreement and includes transactions in dealings between parties during life of mortgage. 73 P.S. §§ 201-3, 201-9.2 -- *Id.*
>
> Borrower of money, especially the owner of residential property mortgaged to lending institution, may reasonable expect he or she will receive and above-board treatment in their dealings and that no undue advantage will be taken by the lender. -- *Id.*

The Magistrate's analysis of this decision would have provided support for Petitioner, but this was not reflected in the recommendation.

Petitioner never received from Respondent fair or above-board treatment

and it is clear that Respondent took undue advantage of Petitioner. This aspect has been completely overlooked by the Magistrate.

Finally, when Petitioner suspected fraud and objected to that situation, Respondent promptly forging Petitioner's signature disposed of the collateral.

In the above alleged multiple acts of fraud, Respondent in its several actions maintained Total Silence and concealed material facts which were not available to Petitioner, which disclosure to Petitioner by Respondent, would have prevented Petitioner from incurring considerable financial injuries.

The last aspect of forgery of Petitioner's signature to dispose of the collateral was not even mentioned in the Magistrate's recommendation. The Magis-

trate had completely missed this aspect of fraudulent action of Respondent. Thus, the Magistrate's evaluation was in total conflict with the judgements of other Circuits' Court of Appeals.

"RICO" RECOMMENDATIONS

The Magistrate's "RICO" recommendations consequently were misdirected, since he dismissed all the allegations of negligent representation or fraud stated above, failing even to note the fact that Respondent had a substantial financial interest in the loan transactions, and as clearly stated above in the Fifth Circuit in Tex. 1991, *Richter, S.A. v. Bank of America Nat. Trust & Sav. Assoc.*, 939 F.2d 1176, that, where there are beneficial interests, Respondent is clearly liable. Moreover, the Magistrate clearly

overlooked the fact of Respondent used a forged signature of Petitioner, without the Petitioner's knowledge, to divest the collateral. Since when in law is forgery not an act of fraud? This coupled with the other fraudulent acts stated above clearly establish a multiple pattern of fraudulent acts. It is clearly laid down in C.A. 11 (Ga.) 1991 by the Eleventh Circuit that:

> **C.A. 11 (Ga.) 1991.** A "pattern" of racketeering activity is shown under Racketeer Influenced and Corrupt Organizations Act (RICO) when racketeer commits at least two distinct but related predicate acts. 18 U.S.C.A. § 1961(1). -- *Pelletier v. Zweifel,* 921 F.2d 1465.

> Predicate acts are "related" under Racketeer Influenced and Corrupt Organizations Act (RICO) if they have same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. 18 U.S.C.A. § 1961(1). -- *Id.*

Furthermore, the Magistrate just dismissed without any explanation the fact that Respondent could be held to be liable both as person and enterprise if it engaged in racketeering activities and was direct or indirect beneficiary of pattern of racketeering activity. The Magistrate's recommendations in favor of Respondent is completely erroneous since

it is in total conflict as clearly laid down by the Third Circuit in 18 U.S.C.A. § 1962(a) -- *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, as follows:

> **C.A. 3 (Pa.) 1990.** For purposes of claim under § 1962(a) of RICO, defendant securities firm could be held to be liable both as person and enterprise if it engaged in racketeering activities and was direct or indirect beneficiary of pattern of racketeering activity. 18 U.S.C.A. § 1962(a). -- *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186.
>
> **35. -- What constitutes enterprise in general.**
>
> **C.A. 3 (Pa.) 1990.** For pur-

poses of claim under § 1962(a) of RICO, defendant securities firm could be held to be liable both as person and enterprise if it engaged in racketeering activities and was direct or indirect beneficiary of pattern of racketeering activity. 18 U.S.C.A. § 1962(a). -- *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186.

In conclusion on RICO, under 18 U.S.C. §§ 1961-1968, the following are relevant:

Definitions:

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of

racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce....

§ 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962

> of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

REASONS FOR GRANTING THE WRIT

The reasons are very clear since the Court of Appeals and the District Court only affirmed the Magistrate's recommendations without any observations, and that the Magistrate's findings are in conflict with the established precedents of other Courts of Appeals, as stated specifically under Rules of the Supreme Court. Part III Jurisdiction on Writ of Certiorari -- Rule 10(a) is as follows:

> When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

It has been clearly shown that the Magistrate regarded the loan transaction between Petitioner and Respondent as a simple borrower-lender situation. This is completely erroneous. The Magistrate failed to analyze the clear distinctions in this matter, since Respondent had substantial financial interests. Moreover, some of the further actions of the Respondent were carried out in Total

Silence and thus concealed material information with respect to the loan transactions that Petitioner would have no way of finding out, thus leaving Petitioner in an unfair situation, resulting in financial injuries. These conflicting decisions of other Courts of Appeals are stated in the "Statement of the Case" above. Specifically, attention is directed to the Fifth Circuit cited case in *Richter, S.A. v. Bank of America Nat. Trust and Sav. Ass'n.*, in C.A.D.C. in *Faison v. Nationwide Mortg.*, and in the Seventh Circuit in *Fed. Deposit Ins. Corp. v. W.R. Grace & Co.*

Likewise, under "RICO," the reference to *Pelletier v. Zweifel* should support Petitioner's views. Moreover, the Magistrate's opinion is in total conflict as expressed in *Hoxworth v. Blinder*

Robinson & Co., Inc., in which the Respondent was held liable both as a person and an enterprise if it engaged in racketeering activities and was a direct or indirect beneficiary.

Accordingly, the Opinion of the Third Circuit below also creates a conflict among Circuits with regard to not only the issue of fraud or negligent misrepresentation, but also in respect of "RICO" proceedings. In the opinion below, the Third Circuit failed to determine and evaluate what the questions that Petitioner was raising on these issues?

Consequently, this Court should take this opportunity to clarify these conflicting views of the Third Circuit in the different matters stated above, and should grant certiorari here to explicitly rule that in a lender-borrower rela-

tionship, where lender has considerable financial interests, the lender would be held liable if material information was withheld for the guidance of others in their business transactions, and lender failed to exercise reasonable care or competence in obtaining or communicating information, whether or not misrepresentation was made by accident or by intent. It should be explicit in establishing that such omission of material information can be held liable for fraud or negligent misrepresentation.

On the "RICO" submissions, this Court should clarify and confirm when racketeer commits in at least two distinct but related predicate acts, racketeer is liable under "RICO." Additionally, it should be firmly established that racketeer could be held to be liable

both as person and enterprise if it engaged in racketeering activities and was direct or indirect beneficiary of such activity.

Therefore, this Court should grant certiorari which is respectfully solicited here to explicitly rule on the issues stated above and to resolve the conflict between the Circuits created by the Third Circuit's decision in this matter.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter. If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and

that the matter be remanded to the Court of Appeals for redetermination in light of other Court of Appeals opinions stated above.

DATED: October ~~8~~ 17, 1992

Respectfully submitted,

BIDYUT K. NIYOGI
Petitioner

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 91-3754

BIDYUT K. NIYOGI,

Appellant

v.

EQUIBANK, a Pennsylvania Corporation

Appeal from the United States

District Court for the Western District

of Pennsylvania

D.C. Civil Action No. 90-01319

District Judge:

Honorable Gustave Diamond

Submitted Under Third Circuit Rule 12(6)

February 11, 1992

Before, BECKER, ALITO and ROTH,

Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

Circuit Judge

Attest:

Chief Deputy Clerk

DATED: April 22, 1992

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BIDYUT K. NIYOGI,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. 90-1319
EQUIBANK,	)	JUDGE DIAMOND
a Pennsylvania	)	MAGISTRATE
corporation	)	JUDGE BENSON
	)	
Defendant.	)	

MEMORANDUM ORDER

On August 30, 1990, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §636(b)(1)(A) and (B), and Rules 3 and 4 of the Local Rules for Magistrates.

The magistrate judge's report and

recommendation, filed on August 22, 1991, recommended that defendant's motion for summary judgment be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on plaintiff and counsel for defendant by first-class mail on August 22, 1991. Objections were filed by plaintiff on September 5, 1991. Defendant responded to plaintiff's objections on September 13, 1991. After de novo review of the pleadings and documents in the case, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 20th day of September, 1991:

IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated August 22, 1991, is adopted as the opinion of the court.

GUSTAVE DIAMOND
UNITED STATES DISTRICT JUDGE

cc: Honorable Kenneth J. Benson
United States Magistrate Judge

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BIDYUT K. NIYOGI,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. 90-1319
EQUIBANK,	)	JUDGE DIAMOND
a Pennsylvania	)	MAGISTRATE
corporation	)	JUDGE BENSON
Defendant.	)	

MAGISTRATE JUDGE'S REPORT

AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that defendant's motion for summary judgment be granted as plaintiff has failed to allege a cause of action for fraud, and has, therefore, failed to state a cause of action pursuant to the Racketeer

Influenced and Corrupt Organizations Act (RICO).

II. REPORT

Plaintiff Bidyut Niyogi obtained a loan from defendant on July 2, 1986, whereby an earlier loan from defendant to one Samarenda N. Chakraborty was satisfied, and additional monies were given to plaintiff. The loan was secured by 298 shares of Westinghouse common stock owned by plaintiff. The purpose of the loan was for plaintiff to obtain ownership of a "Food Pantry" convenience store then being operated by Chakraborty. In early 1988, defendant considered the loan to plaintiff to be n default and sold the Westinghouse stock to satisfy the remainder of the loan amount.

Plaintiff, proceeding pro se, filed suit in the Court of Common Pleas of

Allegheny County, Pennsylvania, asserting that defendant fraudulently induced him to obtain a loan in order to satisfy the unpaid balance of the earlier loan to Chakraborty, which, plaintiff asserts, had been written off by defendant as a "dead beat" loan. Plaintiff also asserted that this fraud constitutes a violation of RICO.

Defendant removed this case here, and has filed a motion for summary judgment and to dismiss. Plaintiff has responded, and the matter is ripe for disposition.

SUMMARY JUDGMENT STANDARD[1]

Summary judgment is appropriate if, drawing all inferences in favor of the non-moving party, ". . . the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Sum-

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[1] Both parties have submitted exhibits, affidavits, and portions of depositions as support for their positions. Accordingly, since there are matters at issue which are outside of the pleadings, defendant's motion for summary judgment will be addressed, as the matter would be inappropriate for consideration as a motion to dismiss. Fed.R.Civ.P. 12(c).

mary judgment may be granted against a party who fails to adduce facts sufficient to establish the existence of any element essential to that party's case, and for which that party will bear the burden of proof at trial. Celotex Corporation v. Catrett, 477 U.S. 317 (1986). The moving party bears the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. Once that burden has been met, the non-moving party must set forth ". . . specific facts showing that there is a genuine issue for trial . . ." or the factual record will be taken as presented by the moving party and judgment will be entered as a matter of law. Matsushita Electric Industrial Corp. v. Zenith Radio Corp., 475 U.S. 574 (1986). An issue is genuine only if the evidence

is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FRAUD

In order to establish fraud under Pennsylvania law, the party asserting fraud must prove by clear and convincing evidence each of the following five elements:

(1) a misrepresentation;

(2) a fraudulent utterance thereof;

(3) an intention by the maker that the recipient will thereby be induced to act;

(4) justifiable reliance by the recipient upon the misrepresentation; and

(5) damage to the recipient as the proximate result.

Delahanty v. First Pennsylvania Bank, N.A., 318 Pa.Super. 90, 464 A.2d 1243 (1983), quoting Scaife Co. v. Rockwell-Standard Corp., 446 Pa. 280, 285 A.2d 451, 454 (1971), cert. denied, 407 U.S. 920, in turn quoting Neuman v. Corn Exchange National Bank & Trust Co., 356 Pa. 442, 51 A.2d 759, 764 (1947).

In this case, plaintiff asserts that the misrepresentation consisted of defendant's failure to inform him, at the time of the loan, of the poor financial position that the "Food Pantry" run by Chakraborty was in, and, specifically, that defendant's loan to Chakraborty had been written off as "dead beat." Defendant asserts that it had no duty to disclose its knowledge of the "Food Pantry" or Mr. Chakraborty's loan to plaintiff, and, therefore, that no misrepresentation

occurred.

Indeed, "[i]n order for silence to be considered a misrepresentation, there must exist a **duty** to disclose facts which are material." Consolidated Rail Corp. v. Providence & Worcester, 540 F.Supp. 1210, 1220 (D.Del. 1982) (emphasis in original -- interpreting Pennsylvania law). Pennsylvania common law requires that, for a duty to disclose to arise, there must exist a "confidential relationship" between the parties. Federal Land Bank of Baltimore v. Fetner, 269 Pa.Super. 455, 410 A.2d 344, 348 (1979). This type of relationship does not normally arise in the lender-borrower context, absent some "substantial control" over the borrower's business affairs by the lender. Blue Line Coal Co., Inc. v. Equibank, 683 F.Supp. 493, 496 (E.D.Pa.

1988).

In this case, there is no evidence which would tend to establish that the relationship between the parties was other than a typical lender-borrower relationship. Plaintiff makes much of the fact that defendant required both collateral and insurance for his loan. While this may help establish that defendant had doubts about the long-term success of the "Food Pantry," it does not create the type of relationship between the parties which would give rise to an independent duty to disclose information regarding that business enterprise. As an example, the court in Fetner found no duty to disclose on the part of a bank which had inspected mortgaged property and determined that an easement in favor of the Pennsylvania Department of Trans-

portation had been filed after the land buyer had done the title search, but before the mortgage was consummated. The court found that the inspection by the bank was performed only so that it could satisfy itself that the mortgage amount would be secured, and that no duty existed to disclose its findings to the buyer, since he did not inform the bank that he intended to rely on its inspection, nor did he contract with the bank to review the title. 410 A.2d at 348. Likewise, in this case, any research that defendant did into the viability of the "Food Pantry" as a business enterprise was done to satisfy defendant that its loan to plaintiff would be secured. Although the requirements of collateral and insurance evidence that defendant was not confident in the business enterprise,

there is no indication that plaintiff ever told defendant that he wished them to review the business for him, or that he was relying on defendant to inform him of any prospective problems with the business.[2] In short, the relationship

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[2] In fact, plaintiff asserts that defendant breached a "fiduciary trust relationship between banker and customer." To state that a fiduciary relationship exists is not to establish its existence. Plaintiff's arguments make clear that he believes that defendant was required to inform him of its opinion of his decision to purchase a business enterprise simply because he requested a loan for the purpose of buying that business, and defendant possessed information which was rele-

between the parties in this case was nothing more than a typical lender-borrower relationship, and no duty to disclose information arose.

Accordingly, there are no facts from which a reasonable jury could conclude that defendant owed a duty to disclose any information it had with regard to the "Food Pantry," and defendant is entitled to summary judgment with regard to plaintiff's allegation of fraud.

RICO

Plaintiff alleges that defendant has violated 18 U.S.C. §1962(c) by conducting an enterprise through a pattern of racketeering activity. Plaintiff, however,

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vant to plaintiff's decision. As Fetner clearly establishes, no such duty arises from a mere lender-borrower relationship.

alleges that defendant bank is both the defendant and the alleged enterprise. A claim under §1962(c) may not proceed in such a manner. Kehr Packages, Inc. v. Fidelcor, 926 F.2d 1406, 1411 (3d Cir. 1991).

Further, plaintiff has failed to set forth any "predicate act" as defined by 18 U.S.C. §1961(1). Indeed, his allegation of fraud was, arguably, the only event which could be considered a predicate act, but that claim has been rejected. Thus, there are no predicate acts upon which a "pattern" of racketeering activity may be found pursuant to §1962(c). Kehr, supra.

Finally, it should be noted that, even if defendant's failure to disclose information could be said to be fraudulent in this case, and if other require-

ments under RICO were met, this is simply not the type of case to which RICO was intended to apply. In order of activities to be considered a violation of §1962(c), they must be of such a character that they "amount to or pose a threat of continued criminal activity." H.J., Inc. v. Northwestern Bell Telephone Co., ___ U.S. ___, 109 S.Ct. 2893, 2900 (1989). Here, there is one alleged victim, who secured a single loan. Even if the loan transaction involved predicate acts, and, again, there is no evidence which would support a finding of even one predicate act, the limited nature of the alleged racketeering activity does not satisfy the "continuity" prong of the test under §1962(c), since there is no indication that such activities threaten continued criminal activity.

Therefore, defendant is entitled to summary judgment on plaintiff's RICO claim on several different grounds.

Wherefore, on the basis of the foregoing, it is respectfully recommended that defendant's motion for summary judgment be granted.

KENNETH J. BENSON
UNITED STATES MAGISTRATE JUDGE

Dated: August 22, 1991

cc: Bidyut K. Niyogi, Pro se
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APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 91-3754

BIDYUT K. NIYOGI,

Appellant

v.

EQUIBANK, a Pennsylvania Corporation

(D.C. Civil Action No. 90-01319)

SUR PETITION FOR PANEL REHEARING

WITH SUGGESTION FOR REHEARING IN BANC

PRESENT: SLOVITER, Chief Judge, BECKER,

STAPLETON, MANSMANN, GREENBERG,

HUTCHINSON, SCIRICA, COWEN, NYGAARD,

ALITO, and ROTH, Circuit Judges

The petition for rehearing filed by Appellant, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

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Circuit Judge

Dated: May 15, 1992